United States Court of Appeals

for the Second Circuit

APPENDIX

75-2052

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
CARL BUFORD,

Relator-Appellant,

-against-

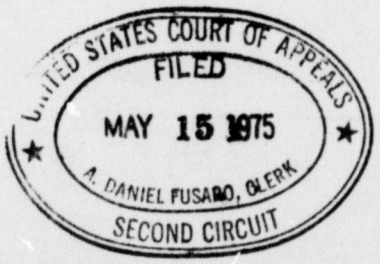
ROBERT J. HENDERSON,
Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Docket No. 75-2052

APPENDIX TO THE BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Of Counsel

PAGINATION AS IN ORIGINAL COPY

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel., CARL BUFORD -V- SUPT. AUBURN CORRECTIONAL FACILITY, ROBERT J. HENDERSON	For plaintiff: Carl Buford, #61250 135 State St. Auburn, N.Y.; 13021 For defendant: LOUIS J. LEFKOWITZ 2 World Trade Center New York, N.Y., 10047

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk			1F8		
J.S. 6 mailed	Marshal					
Basis of Action: Writ of Habeas Corpus	Docket fee					
	Witness fees					
Action arose at:	Depositions					

UNITED STATES COURT OF APPEALS FILED 1975 CLERK

DATE	PROCEEDINGS	Date Order Judgment N
r.7,74	Filed petition for writ of habeas corpus.	
r.7,74	Filed order granting petitioner to proceed in forma pauperis.Pollack,J.	
.3-74	Filed order extending time of respondent to answer petition to April 25, 1974-Tenney, J.	
r.30,74	Filed order extending time of respondent to answer petition to 5/22/74,Pierce,J.	
ne6,74	Filed Order extending time of respondent to answer to June 16, 1974, Cannella, J.	
n.21,74	Filed Respondents answer to petitioner application for writ of habeas corpus.	
UL.19,74	FiledMemo endorsed, motion denied, Duffy,J.	
ul.22,74	FiledRespondent's affidavit in opposition to petitioner's application for writ or habeas corpus.	
p.3-74	Filed Respondent's affidavit in opposition to Petitioner's application for a writ of habeas corpus.	
p.19,74	Filed petitioner's motion and affidavit for adjournment to traverse respondent's brief.	
p.19,74	Filed Memo endorsed on motion filed 9/19/74: -- Petitioner's application for transcript denied at this time, without prejudice to renewal at a later time upon greater showing of meritorious cause. Petitioner's application for extension of time to file reply granted until October, 11, 1974-- So ordered--Werker, J.	
t.10,74	Filed petitioner's traverse to respondent's opposition brief.	
t.10,74	Filed notice of assignment to Knapp, J.	
ct.30-74	Filed Petitioner Pro se affidavit & notice of motion for copy of transcripts ret. before Knapp,J.	
v.6-74	Filed OPINION#41401.Petitioner's request for writ of habeas corpus is in all respects denied.So Ordered.Knapp,J.(mn)by Pro Se Clk)	
v.7-74	Filed Memo-endorsed on petitioner's motion filed 10-30-74 for copy of transcripts: Motion for a transcript is denied. Knapp,J.	
ec. 31-74	Filed ~~plaintiff~~ petitioner's notice of appeal from a decision of Judge Knapp, dated Nov. 4-74, dismissing the petition for writ of habeas corpus. M/N by Pro se Clerk.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

74 CIV. 1055

U.S.A. ex rel. CARL BUFORD,
Petitioner

-v-

ROBERT J. HENDERSON, Superintendent
of Auburn Correctional Facility,
Respondent.

FILED
U.S. DISTRICT COURT
MAR 7 10 28 AM '74
S.D. OF N.Y.

Upon reading the annexed affidavit of Carl Buford requesting that he be permitted to file his petition for writ of habeas corpus without prepayment of fees or costs or security therefor, and it appearing to the Court that this application should be granted, it is

ORDERED, that he be and hereby is permitted to proceed in forma pauperis without prepayment of fees or costs or security therefor, in accordance with Title 28, United States Code, Section 1915(a).

Dated: New York, N. Y.
March 5, 1974.

Milton Pollack
U. S. D. J.

PETITION FOR WRIT OF HABEAS
CORPUS BY PERSON IN
STATE CUSTODY

74 CIV. 1055

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted]

CARL BUFORD #61250, NYSIIS# [redacted] :

- VS - :

ROBERT J. HENDERSON, Superintendent :
of Auburn Correctional Facility. :

Case No.----------
(Clerk to Supply)

INSTRUCTIONS - READ CAREFULLY

To be considered by the District Court, this petition must be in writing (legibly handwritten), signed by the petitioner and verified (notarized and sworn to). Answers to each applicable question must be concise. If the space is too small for the answer to a particular question, finish it on the reverse side of the page or insert an additional blank page, making clear to which question the continued answer refers.

Every petition for habeas corpus must be sworn to under oath. A false statement of a material fact in the petition may be made the basis of prosecution and conviction for perjury. Petitioners should take great care that their answers are true and correct.

The filing fee is $5.00

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information that will establish whether petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

(1 of 11) cont.

The execution and filing of this form shall be deemed a complete substitution for any and all papers heretofore filed in this Court for the same relief.

When the petition is completed, the original and two copies shall be mailed to the Clerk of the District Court for the Southern District of New York.

A copy of the petition, must be served on respondent (SUPERINTENDENT), and a verified (notarized and sworn to) statement of such service must be attached to the petition.

In addition, please be advised that under Title 28 U.S.C., Sec. 2241 (d), a petition for a writ of habeas corpus may be filed in the U.S. District Court for the Southern District of New York, only if you are presently incarcerated within the Southern District, or were sentenced by a Court within the Southern District.

****

(2 of 11)

The undersigned, having read and agreed to the foregoing Instruction, hereby applies for a Writ of Habeas Corpus pursuant to Chapter 153 of Title 28 of the United States Code, in support thereof, makes the following statements and answers under oath.

1. Place of detention Auburn Correctional Facility, Auburn New York.

2. Name and location of court which imposed sentence County Court, Rockland County, New City, New York.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) Indictment No. 67 - 118.

(b) Murder in the First Degree.

4. The date upon which sentence was imposed and the terms of the sentence:

(a) June 18,1968.

(b) 25 years to natural life.

(2 of 11) cont.

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty X

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury X

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

1. Appellate Division, Second Department, Brooklyn, N.Y.

11. New York State Court of Appeals.

(b) the result in each such court to which you appealed:

1. Opinion rendered.

11. Denied entry.

(c) the date of each such result:

1. June 21,1971.

11. September 28,1971.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

1. 37 A.D.2d 38, 324 N.Y.S.2d 100.

11. None.

9. If you answered "no" to (7), state your reasons for not so appealing:

10. (a) Did admission of evidence not directly connected to defendant abuse discretion of trial court and violate defendants' due process and equal protection rights under the 14th Amendment through prejudicial errors allowed?

(b) Defendant was deprived of his constitutional right of "reasonable doubt" by use of circumstantial evidence as factual evidence.

(c) Did the late Miranda warning violate defendants' constitutional guarantees of equal protection of law? Was the manner in which the warning was given sufficient for defentant to gain a meaningful understanding?

(d) Did pre-trial suppression of statements favorable to defendant inhibit his defense procedures?

(e) Did refussal to strike Peoples' exhibit deny defendant equal protection under law and violate his due process rights?

(f) Did failure to grant motion for dismissal due to failure of prosecution to present a prima facie case harm defendants equal protection status?

(g) Were errors of acceptance of the Appellate Court harmful to defendants' due process rights?

POINT I:

DID ADMISSION OF EVIDENCE NOT DIRECTLY CONNECTED TO DEFENDANT ABUSE DISCRETION OF THE TRIAL COURT AND VIOLATE DEFENDANTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14th AMENDMENT THROUGH PREJUDICIAL ERRORS ALLOWED?

a) The prosecution was allowed to introduce fingernail scrapings of blood and flesh, taken from petitioner, that were neither identified as human nor proven to be fruit of some wound on the deceased. See People vs Razezicz, 206 N.Y. 248 (inference on inference). Though later stricken from trial testimony the hiatus of time was too long for the jury to disabuse themselves of this testimony.

b) The fact that petitioner was not given a Miranda warning prior to the taking of the fingernail scrapings, violate the constitutional concepts emphasized, upheld and implemented by the United States Supreme Court in Aguilar vs. Texas, 378 U.S., 108, 84 S.Ct. 1509. Defendant was already under arrest because he was unable to leave the precinct stationhouse. See Miranda vs. Arizona,384 U.S. 436, 86 S.Ct. 1602; Davis vs. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 676.

c) The lax manner in which the fingernail scrapings were taken showed a lack of expertize and quality-control as required in State and Federal courts. The then bungling manner in which this item was transmitted to the State Laboratory further increased the already great possibility of error in analysis of the blood and flesh scrapings. The testimony of the laboratory expert was of no value to the connecting of the defendant to the corpus delecti or the death of the deceased. It was brought before the jury solely to confuse them. The trial testimony of this witness, Mr. Robert Joseph McKinley (Trial manuscript pp. 1569-1648) shows that there was no necessity for him to take the stand as he could make no contribution to the prosecution of the case except present the jury_

with confusing testimony that could and did aid in the attempt to circumstantially bind the defendant to the death of the deceased.

d) Exhibits of bits of teeth, hair-like matter, etc. were entered though never connected to the corpus. They did not fit any wound on the body of the deceased and further prejudiced the defendant with the jury. Their sole use was to show that perhaps there was a fight immediately preceeding the death of Yvonne Dove. In truth there never was evidence that a fight occurred at that time nor that if one did occur that the defendant was a participant thereof. The items admitted were not part of the res gestae could only have a usage of inflaming the jury. (Res Gestae: see Black's Law Dictionary, Revised 4th Ed., p. 1469). There was never any direct testimony as to what items were tested to show connection with the deceased nor were any results of these tests ever shown.

e) The corpus delecti of the crime was never proven. The cause of death is actually unknown. The assistant coroner who made the autopsy admits in his testimony that he did not know positively the cause of death. He only gained a positive opinion after consultation with Dr. Halpern, through his notes. Dr. Halpern never examined the body nor did any other expert presented by the prosecution. Their assumption that criminal death occurred were from a written report by an admittedly incompetent pathologist who had only seen two strangulation cases in his career and it was never determined if these were criminal. His small, almost nil experience in this type of death left a large doubt concerning how Yvonne Dove died. This doubt was never resolved. Two sets of experts gave two different opinions of the value of the autopsy report. The trial Court should not have let the case go to the jury with this matter unresolved.

Richardson on Evidence, 9th Ed. Sec. 390, p. 383-386 states in essence, that experts testifying to matters they did not personally examine can only make their findings in a specific manner, viz., "I think", "It is probable" or "I believe it to have occurred" (Rule 4515 Civil Practice Act). Definite statements without qualifications were al... to go to the jury. This is against the basis of eviden... case law. Rule 4515 C.P.A.; Richardson on Evidence, 9th Ed., Sec. 391, p. 386-387. Juries can only decide who caused a death. It is a constitutional violation of the 6th and 14th Amendments to the United States Constitution for them to decide that a death occurred. There are Statutory Provisions for the establishment of death and trial juries are not admitted under them. (See, N.Y. C.C.P., Sec. 777, 778-A, 778). Due Process requires a jury to decide after a death has been proven criminal, who committed the crime. This function adheres only after a crime had been proven to have occurred. cf. Eddington v. Aetna Life Ins. Co., 77 N.Y., 564; U.S. Const. Amend. 5, 14; N.Y. C.C.P. Sec. 834. The testimony of Dr. Halpern and accompanying experts fell under the aegis of Jewett v. Boston Elevated Railway, 219 Mass 528 which states: ....At the trial of an action for causing the death of the plaintiffs' interstate, the report of a medical examiner is not made competent as evidence because it may have been one of the grounds on which an expert, who has testified, based his opinion.

The experience of the coroner in strangulation cases was proven to be almost nil (see Gable v. Rauch, 275 N.E. 555, 50 S.C. Rep. 95); (Trial Transcript p. 1802-1945), yet Dr. Halpern's expert opinion was based on the report of an uncorraborated report of an inexperienced coroner who was admittedly inadequate in the strangulation portion of pathology.

Appellate Courts have long held that the opinion of a medical expert based on facts within his own knowledge and observation are competent.

They have not held that an opinion based on an inexact report by an inexperienced person can be used as a factual basis for an expert opinion. Citing from Griswold v. N.Y.Y.C. & H.R.R.R., G., 115 N.Y. 61 at 64, 21 N.E. 726 ***"Medicine is very far from being an exact science. At the best, its diagnosis is little more than a guess enlightened by experience***.... It is argued that the witness must have an opin[illegible]s to the permanance of the injury and then may express [illegible] but necessarily the opinion must rest upon a balance of probabilities, inclining the medical judgment one way or another, and the opinion given is none the worse because it expresses, and does not conceal that it rests on a reasonable probability strong enough to justify the formation of an opinion. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed. 2d 1217 states: ***Held that a conviction must fail under the 14th Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears" even though the testimony may be relevant only to the credibility of a witnes-s***

The cumulative evidence of the fingernail scrapings, Doctor Halpern's testimony and descriptive photos of the scene of the alleged crime brought false evidence before the jury. This evidence was vital in supporting the theory of prosecution and of great harm to the defendant. cf . Mayor v. Pentz, 24 WEND (N.Y.) 668, 675; People v. Patrick, 182 N.Y. 131, 172-173, 74 N.E. 843, 856; People v. Hinhsman, 192 N.Y. Rep. 421 (1908).

POINT II.

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT OF "REASONABLE DOUBT" BY THE USE OF CIRCUMSTANTIAL EVIDENCE AS FACTUAL EVIDENCE.

Richardson on Evidence, 9th Ed., Sec. 149,p. 135 states the legal definition of circumstantial evidence.

These principles of circumstantial evidence are further buttressed by the New York Civil Practice Law and Rules, Sec. 4515 and New York case law, People v. Patrick, 182 N.Y. 131, 172-173, 74 N.E. 843, 846; People v. Bretagna, 298 N.Y. 323, 83 N.E.2d 537 and Federal case law, Hunt v. United States, 316 F.2d 652 and through the equal protection rights of the 6th Amendment and the 14th Amendment. Evidence was presented to the jury as factual when in truth they were inferences which had many possible meanings and had never been proven. Inferences upon these inferences were then presented as circumstantial evidence to buttress the case of the prosecution. The rationale cited in Wong Sun v. United States, 371 U.S. 471, 83 S., Ct. 407 though in that case used for illegal search and seizure, embraces the case at bar. The principles state in Wong Sun, supra show that falsity or illegality in the base precludes use of any further evidence stemming from the false base whether incriminating or not. It was never made clear to the jury that these facts underlying the supposebly tightly bound circumstantial evidence presently were themselves circumstantial and never proven factual. Case law as shown by Richardson on Evidence, 9th Ed., Sec. 152 p. 137 follows the principle that the fact underlying the presumptions and inferences of circumstantial evidence must be <u>definitely</u> proven, not assumed.

The "reasonable doubt" rights of defendant were completely ignored during trial. Defendant, in a small community and after adverse newspaper publicity, should have been accorded the greatest of protection from possible influencing inferences and presumptions.

This was not done. In fact, the prosecution was allowed the greatest possible leeway in presenting its case. Several times during the trial, questions arose which were of constitutional statute i.e., Sgt. Chous' testimony; motion to dismiss exhibits as non-pertinent and several other instances.

These questions were of an importance sufficient to invoke a Jackson type hearing (Jackson v. Denno, 378 U.S. 368, 84 S.Ct., 1774, 12 L.Ed. 2d 908; Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L. Ed.2d 760; Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L. Ed.2d 770; Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L. Ed. 948; C.C.P. N.Y. Sec. 395. Though defendant's counsel was lax in making motions on these constitutional valued questions, defendant cannot be assumed to have waived his rights in these instances. Definite consent and understanding cannot be shown.

It is the duty (where counsel fails) of the trial judge to protect the defendant. If there are large questions of possible constitutional conflict, they must be decided outside of the presence of the jury through the judges' motion. Instead, the jury was allowed to rule and deliberate upon these questions under the guise of "credibility".

Where evidence is of sufficient probative force, a crime may be established by circumstantial evidence, but where the principle circumstance urged from which to infer guilt is wholly based upon an underlying circumstance or inference, the testimony is unsatisfactory, sence no reliable inference can be drawn from premices which are themselves uncertain. See, People v. Razezicz, 206 N.Y. 248 at 269, 270, 271; United States v. Rosa, 92 U.S. 281, 283; Greenleaf on Evidence, 16th Ed., Sec. 14; cf. People v. Bonafacio, 190 N.Y. Rep. 151; Brooklyn Heights R.R. Co., 154 N.Y. 90, 47 N.E. 971.

POINT III.

DID THE LATE MIRANDA WARNING VIOLATE DEFENDANTS' CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION OF LAW? WAS THE MANNER IN WHICH THE WARNING WAS GIVEN SUFFICIENT FOR DEFENDANT TO GAIN A MEANINGFUL UNDERSTANDING?

Prior to the Miranda warning petitioner had a body statement (fingernail scrapings) taken from him (trial testimony of Ralph Krason p. 522-619, p. 193,194).

See, Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L. Ed. 2d 676. Interrogation was begun by the investigator for the County Attorney with a hasty and lackadaisical warning to defendant. Trial testimony does not show that defendant understood or waived his rights. It is shown from the testimony that an attempt to hurridly pressure defendant occured and succeeded. Defendant made oral statements but no attempt was made to get a written statement. Possibly because defendant became aware of his rights. This give a logical inference that the Miranda warning was given after the statements and not before. This, of course, is only an inference which cannot be presented as fact but which from the various testimony carries a strong presumption of truth.

It also gives a reason why the trial testimony concerning the statement is so weak. There was no stenographer present at the interrogation and there is no written record but the self-serving ones of the prosecution. Though this was an alleged murder case, adequate interrogatory procedures were not instigated. A mere reading of a Miranda card has not been deemed sufficient to show a defendant's understanding of his rights. See, Henry v. United States, 361 U.S. 88, 100,101, 80 S.Ct., 168,170; Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250; Argersinger v. Hamlin, 92 S.Ct. 2006; Weeks v. United States, 323 U.S. 383, 34 S.Ct. 341, 58 L. Ed. 652.

The doctrine concerning use of body statement testimony is, "In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had.

The fingernail scrapings were used at trial though it was known to the prosecution, (prior to trial) that it could not be proven that they were even human scrapings and if human, that they came from the deceased. The acceptance of this testimony, even temporarily, by the trial court helped to influ-

ence and inflame the jury and was a complete violation of defendant's 5th & 6th Amendment rights through the 14th Amendment of protection against self-incrimination and equal protection of laws, though the incrimination here was acceptance of fraudulant evidence which gave the appearance of criminal action, it, of necessity, harmed defendant. See, Brown v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L. Ed. 568; Brown v. Mississippi, 297 U.S.278, 56 S.Ct. 461, 80 L. Ed. 682; Eubanhs v. Louisiana, 356 U.S. 584, 78 S.Ct. 970.

The priniciples of coerced confession are applicable here though defendant made no confession. The implications and presentation of the prosecutors case were as if defendant had confessed. The use of the body statement was invoked to show the jury a mute confession through fingernail scrapings with an implication that they came from the body of the deceased.

POINT IV.

DID PRE-TRIAL SUPPRESSION OF STATEMENTS FAVORABLE TO DEFENDANT INHIBIT HIS DEFENSE PROCEDURES?

A written report of Sgt. Chous (Prosecution Exhibit 25) was withheld from the defense prior to trial. His report came out at trial and stated that John Sinclair committed the crime and that defendant was not John Sinclair. The statement was by a young boy who knew defendant by sight. This witness was never presented in Court nor his actual statement presented to the defense. In the midst of trial defense attorney had no opportunity to question this witness and present him at trial if needed. This report also described a head wound deceased had early in the day. This wound was treated at a hospital. Yet during trial prior to the Chous testimony inferences were made that this wound occured at the time of death.

This suppression of favorable evidence violated the fundamental right of defendant to present witness in his favor and to know of favorable testimony. This constitutional right has been consistently and steadily upheld by the United States -

Supreme Court in various decisions over the years. See, Barber v. Warden, Maryland Penitertiary, 331 F.2d 842, 845-846.

The fact that Sgt. Chous could be questioned at trial was not within the sufficient time (PREPARATION) against suprise witnesses or testimony whether such a happening is favorable or harmful to the defendant. Hearsay was presented but the defense had no opportunity to clarify it. They were bound, by the trial court, to the conclusions drawn upon these statements by Sgt., Chous and the prosecution. The opportunity to show that their conclusions were incorrect through the witness (unknown young boy) himself, were denied the defendant. Aguilos v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed. 2d 723 (1964) see also, Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 27 L., Ed. 2d 637 (1969); Cochran v. United States, 291 F.2d 633 (1961); Costello v. United States, 298 F.2d 99 (1962).

The aforementioned cases show the value of use of informant testimony whether by prosecution or defense and show the safeguards necessary for usage of testimony of unknown informants. Suppression of an informant's story is a judicial matter and not a right of police departments or prosecutors' offices. cf. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed., 2d 387 (1970), N.Y. C.C.P. 195.

POINT V.

DID REFUSAL TO STRIKE PEOPLES' EXHIBIT DENY DEFENDANT EQUAL PROTECTION UNDER LAW AND VIOLATE HIS DUE PROCESS RIGHTS?

It is standard of American jurisprudence that evidence presented in a trial must have connection with the crime charged. A connection that bears upon the commission of crime is the basic values assigned to this right. People v. Harris, 209 N.Y. 70, 82, 102 N.E. 546, 550; People v. Caruso, 246 N.Y., 437, 444, 159 N.E. 390, 392.

Defendants' attorney motioned for dismissal of all the Peoples' exhibits as not connected to either the defendant or the cause of death.

These items were also not connected to the deceased in any criminal context. A few were possible and slight descriptions of the scene of the alleged crime and carried no probative value except inflammation of the jury. It was not proven that the disorder of the house occurred at the time of death.

The use of these exhibits were violative of defendants' right of due process and equal protection under the constitutional guarantees of the Bill of Rights through the 14th Amendment to the United States Constitution. No inference of crime could be drawn from them. The trial testimony of Patrolman Ralph Krosson pp. 522 through 631 and Charles McElroy pp. 864 to 1210 showed that in fact these exhibits were not a part of the crime. The trial court though, allowed them to be used as if they were direct and probative evidence.

These exhibits were used as a foundation for the presentation of circumstantial evidence to enhance the presumption of appellants' guilt. The fact that they could not be connected with the defendant or the deceased, as a part of the alleged crime, should have precluded their use for any purpose. See, People v. Razezicz, 206 N.Y. 249, 99 N.E. 557; Ruppert v., Brooklyn Heights R.R. Co., 154 N.Y. 90, 47 N.E. 971; People v. Kennedy, 32 N.Y. 141, 146; People v. Jackson, 255 App. Div., 688, 8 N.Y.S.2d 939; Wigmore Evidence, Sec. 41; People v. Foley, 307 N.Y. 490, 121 N.E.2d 516.

POINT VI.

DID FAILURE TO GRANT MOTION FOR DISMISSAL DUE TO FAILURE OF THE PROSECUTION TO PRESENT A PRIMA FACIE CASE HARM DEFENDANTS' EQUAL PROTECTION STATUS?

The entire trial transcript (4000 pages) shows only that Yvonne Dove died. It shows no other acceptable fact. There was no definite cause of death. There was no proof she died in or of a criminal attack. It was never shown or proven that anyone was with her at the time of death.

The last proven knowledge of Yvone Dove is several hours prior to her death. No one ever came forward and admitted seeing her alive after 2:30 P.M., but she died at 6 P.M.

Suppositions were presented at trial as facts. Theories were expounded as truth. No one as yet has shown what happened to Yvone Dove during these hours. Her death was only proven to be an enigma. This was not sufficient to allow this case to go to the jury or to uphold this conviction in the Appellate Courts of New York. Yet this was done to the defendants harm.

The State did not present a prima facie case. The defense motioned for dismissal and was denied. Defendants' right to equal protection under the law was abrogated. His status as an innocent party was severely harmed by the trial judges' acceptance of the States' presentations as prima facie when they were not. Though this presentation may have borne resemblance to the required facets of prima facie evidence, they did not in fact have the required facts or necessities in law.

Requisite in a prima facie case is the fact that there has been a crime committed and proof that a crime was committed has been established. This has not been done in this case. People on Complaint of Mulhern v. Kaufman, 1 N.Y.S.2d 362, 165 Misc. 670 states: A "crime" is an act committed or omitted in violation of a public law either forbidding or commanding it. N.Y. Penal Law Sec. 2, People v. Cuozzo, 292 N.Y. 85, 54 N.E. 2d 20 says:

The statute requiring proof in addition to confession to warrant conviction requires proof outside the confession of the"corpus delecti" which, in case of murder or manslaughter, means the body of the crime and is divided into component parts, the first of which is the death of the person and second is that the death is produced through criminal agency. N.Y. C.C. [illegible]ec. 395. In People v. Jennings, 340 N.Y.S. 2d 25, 40 A.D.2d 357 the Court required:

"Any form of proof, direct or circumstantial, satisfies requirement that there must be additional proof in addition to confession, but policy remains that there must be proof that crime charged was committed by someone". N.Y. C.P. L. 60.50; N.Y. C.C.P. 395. (Emphasis supplied).

Though the above cases are on confessions and there was no confession in the case at bar, the principle stated is that before conviction can stand there must be proof that a crime occurred (emphasis supplied), a factor not presented in the case at bar. N.Y. C.C.P. Sec. 395.

POINT VII.

WERE ERRORS OF ACCEPTANCE OF THE APPELLATE COURT HARMFUL TO DEFENDANTS' DUE PROCESS RIGHTS?

On appeal defendants' assigned Public Defender attorney-man accepted replacement exhibits by the prosecution. This was done without consultation with his client. The photographic exhibits in question were made by polaroid camera and therefore could not be duplicated. The originals were lost, yet it was claimed that the substitutes were descriptively the same. As polaroid photographs do not have permenent negatives, a substitution of equal identity seems rather far-fetched.

The Appellate Court claimed in its opinion that the photos were of no importance in the trial. This brings up the question of why were they used at trial. Only an attempt to inflame the jury will satisfy this question. See footnotes 1,2,3 People v. Buford, 37 A.D.2d 38, 324 N.Y.S.2d 100.

The Appellate Court erred in law throughout much of its opinion, See, Constitutional Amendment 6,14; Holland v. United States, 348 U.S. 121, 138-139.

12. Prior to this petition have you filed with respect to this conviction

(a) any motion in State court for a new trial? Yes.

(b) any petition in State court for a writ of error coram nobis or any motion in the nature of coram nobis? Yes.

(c) any petitions in State or Federal courts for habeas corpus? Yes.

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(e) any other petitions, motions or applications in this or any other court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

1. Habeas Corpus in State Court.

11. Writ of Error Coram Nobis.

111. Appeal from Writ of Error Coram Nobis.

(b) the name and location of the court in which each was filed:

1. County Court of Cayuga County, New York State.

11. Rockland County Court, New City, New York.

111. Appellate Division, Second Department (Incorporated with Direct Appeal).

(c) the disposition thereof:

1. Denied.

11. Denied.

111. Denied, No opinion.

(d) the date of each such disposition:

1. February 8,1972.

11. June 2,1970.

111. June 21,1971.

13. cont. (e) if known, citations or any written opinions or orders entered pursuant to each such disposition:

1. No Citations.

11. No Order and No Memorandum.

111. 37 A.D.2d 699, 324 N.Y.S.2d 105.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

1. Did Failure To Grant Motion For Dismissal Due To Failure Of The Prosecution To Present A Prima Facie Case Harm Defendants' Equal Protection Status.

(b) the proceedings in which each ground was raised:

1. Habeas Corpus, February 8,1972 (See Exhibit "A").

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) None.

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any ~~pending~~ petitions, motions or applications with respect to this conviction, which you filed? Yes (Incorporated with "D").

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

1. Mr. Arnold Becker, Public Defender, Rockland County Courthouse, New City, New York.

11. Mr. Eugene N. Covalla, Jr. 2 Main Street, Hoverstrow, New York.

111. McCarmack & Seidenberg, West Nyack Rd. West Nyack, New York.

(b) the proceedings at which each such attorney represented you:

1. Mr. Arnold Becker, Trial.

11. Mr. Eugene N. Covalla, Jr. Appeal.

111. Mr. McCarmack & Seidenberg, Writ of Error Coram Nobis.

19. If you have any additional information relevant to this application, not covered by the foregoing questions and answers, add the same below. I do not do so, due to the fact that I am without a copy of Trial transcript.

20. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes.

Carl Buford C 61250

Signature of Petitioner

Pro Se

135 State Street

Auburn, New York 13021

New York State)
County of Cayuga) ss.:

I, Carl Buford, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Sworn to before me this 19 day of February, 1974.

Carl Buford C 61250
Signature of Petitioner

Elaine A. Shaw

ELAINE A. SHAW
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 19 75

FORMA PAUPERIS AFFIDAVIT

I, Carl Buford, being sworn, deposes and says: That he is a Citizen of the United States by birth; That he is indigent and does not have any monies or real property to pay the filing fees and costs of this Habeas Corpus action nor to pay for the required State Court Transcripts; That petitioner above-named moves this Honorable Court pursuant to Title 28 U.S.C.A. Sec., 1915, for the relief of filing necessary papers with the court without cost to petitioner and for the assignment of counsel, all which is most respectfully prayed for.

/s/ Carl Buford
Petitioner

STATE OF NEW YORK X
ss
COUNTY OF CAYUGA X

Carl Buford, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Carl Buford #81350
Petitioner

SUBSCRIBED AND SWORN TO before me this

19 day of February, 1974.

Elaine A. Green.
Notary Public.

My commission expires

_____
(month) (day) (year)

ELAINE A. GREEN
Notary Public, State of New York
Cayuga County
My Commission Expires March 30, 1975

AFFIDAVIT OF SERVICE

I, Carl Buford, being duly sworn, states that he has served a copy of the attached petition upon Robert J. Henderson, Superintendent, Auburn Correctional Facility, 135 State Street Auburn, New York.

/s/ _____

Petitioner, Pro Se #61250

135 State Street

Auburn, New York 13021

SUBSCRIBED and SWORN TO before me this

19 day of February, 1974.

Elaine A Graves.

Notary Public.

My commission expires

_____.

(month) (day) (year)

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
Commission Expires March 30, 19

United States District Court
for the Southern District of New York x

United States ex rel Carl Buford :

- V - :

Robert J. Henderson, Superintendent, :
Auburn Correctional Facility. x

Notice of Motion
28 U.S.C.A. 2247,
28 U.S.C.A. 2249.

County of Cayuga)
ss.:
State of New York)

Carl Buford, petitioner named above hereby with the verified annexed affidavit moves this Court in and under 28-U.S.C.A. 2247 and 28 U.S.C.A. 2249 and upon all the proceedings heretofore had herein at the Courthouse of this Court, Foley Square, United States Courthouse, New York City at ten o'clock on the 11 day of MARCH ,19__, in the forenoon or as soon thereafter as counsel can be heard for an order directing the Attorney General of New York State and the County Attorney of Rockland County, State of New York to present to the Court the papers mentioned hereafter in the attached Affidavit.

Dated: 2-19-74, Auburn, N.Y.

Sincerely yours,

Carl Buford 61255

Petitioner, Pro Se

CC: To

Attorney General, N.Y. State

County Attorney, Rockland County

District Court for the Southern District of New York

United States ex rel Carl Buford	Affidavit in Support of Motion Under 28 U.S.C.A., Secs. 2247,2249.
- V -	
Robert J. Henderson, Superintendent, Auburn Correctional Facility.	

County of Cayuga)
ss.:
State of New York)

Carl Buford, being sworn, deposes and says: That he is the above-named appellant and makes this affidavit in support of a motion under Title 28 U.S.C.A., Sections 2247 and 2249 for an order requiring the Attorney General of the State of New York and/or the County Attorney of Rockland County, State of New York to produce before the Court for persual by said Court the following documents:

1 - Indictment #67-118.
2 - Transcript of Huntley Hearing.
3 - Transcript of Grand Jury Minutes in Indictment #67-118.
4 - Trial Transcript with copies of all written motions attached.
5 - All statements taken by police and County Attorney's Staff that are or could possibly be favorable to petitioner.
6 - Any copies of oral statements by defendant (Tapes etc).
7 - Any copies of written statements by defendant, signed or unsigned.
8 - Copies of Appellate Briefs of defendant, respondent and Appellate Court opinion.
9 - Transcript of Arraignment and Sentence under Indictment No. 67-118.
10 - Medical Examines report; original and final.

Petitioner being unable to afford duplication of Appellate Brief and Indictment or to pay costs of the Trial Transcript and other papers mentioned above moves this Honorable Court under the rationale of Cramer v. Washington, 18 S.Ct.1, 168 U.S. 124, 42 L. Ed. 407, and Title 28 U.S.C.A., Sections 2247 and 2249 to order said records to be produced by respondent.

Wherefore petitioner asks this Honorable Court to grant the motion herein stated and any and other relief as justice may required.

Sworn to before me this
12 day of February, 1974.
Elaine A. Graves.
Notary Public.

Respectfully Submitted
/s/ Carl Buford 61825
Carl Buford, Appellant
Pro Se

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
CARL BUFORD,

Petitioner,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent.

AFFIDAVIT IN OPPOSITION

74 Civ. 1055
Pro Se

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARGERY EVANS REIFLER, being duly sworn, deposes and says:

1. I am a Deputy Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent herein. I submit this affidavit in opposition to petitioner's application for a writ of habeas corpus.

2. Petitioner is presently incarcerated in Auburn Correctional Facility, Auburn, New York, pursuant to a judgment of conviction on indictment no. 67-118 for murder in the second degree after a trial by jury in the County Court of Rockland County, New City, New York. Petitioner was convicted and sentenced to 25 years to natural life on June 18, 1968 (Gallucci, J.).

3. According to paragraph 13 of his petition to this Court, petitioner petitioned for a writ of error coram nobis in the Rockland County Court, New City, New York, which was denied on June 2, 1970. Petitioner's demand of coram nobis was unanimously affirmed by the Appellate Division, Second Department, People v. Buford, 37 A.D. 2d 38 (2d Dept., 1971). Petitioner thereafter petitioned for a state writ of habeas corpus in the County Court of Cayuga County, New York State, which was denied on February 8, 1972.

4. Petitioner delineates on the fourth page of his petition for a federal writ of habeas corpus, seven points on which he bases his claim for relief; they are as follows:

> "(a) Did admission of evidence not directly connected to defendant abuse discretion of trial court and violate defendant's due process and equal protection rights under the 14th Amendment through prejudicial errors allowed?
>
> (b) Defendant was deprived of his constitutional right of 'reasonable doubt' by use of circumstantial evidence as factual evidence.
>
> (c) Did the late Miranda warning violate defendants' (sic) constitutional guarantees of equal protection of law? Was the manner in which the warning was given sufficient for defendant to gain a meaningful understanding?
>
> (d) Did pre-trial suppression of statements favorable to defendant inhibit his defense procedures?
>
> (e) Did refusal to strike People's exhibit deny defendant equal protection under law and violate his due process rights?
>
> (f) Did failure to grant motion for dismissal due to failure to prosecution to present a prima facie case harm defendants equal protection status?
>
> (g) Were errors of acceptance of the Appellate Court harmful to defendants' (sic) due process rights?"

5. It is apparent on first glance that petitioner's claims (a), (b), (e), (f) and (g) deal exclusively with the evidence that led to the jury's verdict of guilty. Petitioner makes a number of conclusions and cites at great length cases decided by the courts of the State of New York. Neither of these approaches are of any persuasive value in a petition for a federal writ of habeas corpus because the petitioner has failed to establish the existance of any federal, constitutional question. The relevant law is, in fact, not in the petitioner's favor in that the question of sufficiency of evidence is one which the the federal courts are very reluctant to entertain except in the most blatant violations of due process of law not present here. Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961). It can hardly be said that this

instant case is one which could pass the totally-devoid test established and applied in Thompson and Garner. Rather, there was, as revealed by the trial transcript, considerable evidence pointing to Carl Buford as being the guilty party; to wit: the petitioner had telephoned the police department asking someone to see if anything was wrong at 52 First Avenue (the apartment in which Yvonne Dove's body was found) (T.M. 524);* an officer testified as to the puffiness and breaks in the skin of the right hand of petitioner (T.M. 559-560); Buford's socks were blood stained (T.M. 886); Buford admitted to police that on the morning of August 26, 1967, he woke up and was sleeping with Yvonne Dove (this was the day of her death, hence he was one of the last people known to have been with her prior to her death), (T.M. 888); Buford tells three versions of events later in the day--first that he did not see her the rest of the day of August 26 (T.M. 894), second that he later reentered the apartment through the bathroom window and saw Dove on the couch (where her body was found by police) and he kissed her and left (T.M. 953), and third that he did not kiss her and leave but he attempted to revive her by throwing water over her and he wiped some of the blood from her body (T.M. 896); dried blood was scraped from his shoulder (T.M. 941-942); and blood stains were found in the fingernail scrapings from Buford's right hand (T.M. 1609-1610); the victim's tongue was found protruding as is the case in manual strangulation (T.M. 1821)--just to name a few of the items of evidence submitted at the trial. (See Brief for the Respondent, pp. 2-9, attached as Exhibit "A"). Consequently it would appear that there is no violation of the petitioner's constitutional rights as his case is

* T.M. refers to the Trial Minutes which are available to the Court on request. No attempt is made to include them in the appendix because they are 4000 pages in length.

hardly devoid of evidence. The most applicable law is that portion of United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1131 (2d cir. 1972) where the Court held:

> "... the claim that the conviction of felony murder was not supported by sufficient evidence of a predicate felony is essentially a question of state law and does not rise to federal constitutional dimensions, United States ex rel. Griffin v. Martin, 409 F. 2d 1300, 1302 (2d Cir. 1969); United States ex rel. Smith v. Reincke, 239 F. Supp. 887, 892-93 (D. Conn.), aff'd 354 F. 2d 418 (2 Cir. 1965), cert. denied, 384 U.S. 993 (1966); United States ex rel. Sadowy v. Fay, 284 F. 2d 426, 427 (2 Cir. 1960), unless there was no proof whatever of the crime charged. Gregory v. City of Chicago, 394 U.S. 111, 112 (1969); Thompson v. City of Louisville 362 U.S. 199 (1960); cf. United States v. Liguori, 438 F. 2d 663, 669 (2 Cir. 1971). Here any claim that there was no proof whatever crime charged, obviously would be frivolous."

Similarly in the case of United States ex rel. Jenkins v. Follette, 257 F. Supp. 533, 534 (S.D.N.Y. 1965), the court noted that "the cases are legion which hold that the habeas corpus court does not sit as an appellate court to review the sufficiency of evidence in support of a conviction under attack."

6. In contention (c) or Point III of petitioner's application, he says that prior to receiving the Miranda warning petitioner had a "body statement" (fingernail scrapings) taken from him. Your deponent does not concede that the Miranda warning was given after the above mentioned evidence was obtained, but even if that were the case, no constitutionally protected right of the plaintiff was violated. "Body statement" is the contrived expression invented by the petitioner in order to invoke Fifth Amendment protection on grounds of self-incrimination. This argument goes against the grain of several very important decisions of the Supreme Court. In the case of Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court of the United States noted that the Fifth Amendment privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance,

to walk, or to make a particular gesture." Id., at 764. In the case of United States v. Wade, 388 U.S. 218 (1967), the Court lists other preparatory steps falling outside the protection of the Fifth and Sixth Amendment, i.e., "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." Id., at 227. Scraping from Budford's fingernails would appear to fall into the category of physical evidence which includes blood samples and fingerprints. Since the petitioner persistantly used the term "body statement", it is especially significant to note that in Schmerber the Court goes to great length to distinguish between physical evidence and evidence which would be of a testimonial or communicative nature. In this case as in Schmerber, the Fifth Amendment "privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," and "the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." 384 U.S. at 761. Indeed, it would amount to judicial hairsplitting for the court to distinguish between taking a fingerprint and taking matter from under a suspect's nails. Such evidence is obviously of a physical nature and to argue otherwise is without merit.

7. Also in petitioner's contention (c) or Point III of his petition, he challenges the voluntariness of his confession by alleging the efficacy of the Miranda warning as it was given to him. This contention is without merit. The pre-trial hearing on this point resulted in a decision adverse to him, whereby, the court held that the Miranda warning was properly given, based on the testimony of several officers, and that there were no threats or promises which might have induced the petitioner to testify, that the petitioner talked freely between the hours of 2:10 a.m. to 6:10 a.m. during which he was offered (but refused) food and drink and that he was also asked repeatedly if he wanted a lawyer to which petitioner replied in the negative until about 6:10 a.m.

Moreover, petitioner's waiver was found beyond a reasonable doubt to have been given intelligently, knowingly, and voluntarily made. (See Decision, Pre-Trial Hearing, pp. 2-3 attached as Exhibit B.) Since the State Court in its factual determination on the voluntariness issue applied the correct voluntariness standards it is presumed to be correct. 287 U.S.C.A. § 2254(d). Lavallee v. Delle Rose, 410 U.S. 690 (1973).

8. In contention (d) or Point IV, petitioner contends that evidence was suppressed to the effect that a witness was not called who had stated that a man named John Sinclair had committed that crime. Petitioner goes to great lengths to emphasize the importance of this point, but he fails to establish that such evidence was vital and material to his case. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prsecution." Id., at 87. As is demonstrated by the trial minutes, petitioner admitted to going by the name of John St. Clair or John St. (T.M. 901). The Brief for the People in petitioner's direct appeal notes that this question was adequately explored and that "the name was spoken and not written." (Brief, p. 13, see Exhibit A.) Obviously, "St. Clair" could readily be misunderstood for "Sinclair." Hence the evidence which was allegedly favorable and unconstitutionally suppressed was in fact not favorable to the petitioner's case but rather would seem to further prove his guilt.

9. Lastly, if there have in fact been any violations of the petitioner's constitutional rights--and there have not--any violation, especially in view of the 4000 pages of trial transcript replete with evidence as to petitioner's guilt, ~~it~~ is harmless error which does not merit the reversal of the court's judgment of conviction for second degree murder. As was said in the case of Milton v. Wainwright, 407 U.S. 371 (1972):

"The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court...by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless. Id., at 377-378."

See also Hanington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

WHEREFORE, respondent respectfully requests that petitioner's application for relief be denied in all respects and that the petition be dismissed.

Margery Evans Reifler
MARGERY E. REIFLER

Sworn to before me this
30th day of August, 1974

Ralph J. McMurray
Assistant Attorney General of the
State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. CARL BUFORD,

Petitioner,

- against -

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

74 Civ. 1055 Pro Se

#41401

KNAPP, D.J.

Petitioner, who is being detained at the Auburn Correctional Facility after being convicted of murder in the second degree, seeks a writ of habeas corpus. He raises seven grounds in his petition, all of which have been ruled upon in the New York State courts. His bases for relief are as follows:

"(a) Did admission of evidence not directly connected to defendant abuse discretion of trial court and violate defendant's due process and equal protection rights under the 14th Amendment through prejudicial errors allowed?

(b) Defendant was deprived of his constitutional right of 'reasonable doubt' by use of circumstantial evidence as factual evidence.

(c) Did the late Miranda warning violate defendants' (sic) constitutional guarantees of equal protection of law? Was the manner in which the warning was given sufficient for defendant to gain a meaningful understanding?

(d) Did pre-trial suppression of statements favorable to defendant inhibit his defense procedures?

(e) Did refusal to strike People's exhibit deny defendant equal protection under law and violate his due process rights?

(f) Did failure to grant motion for dismissal due to failure of prosecution to present a prima facie case harm defendants equal protection status?

(g) Were errors of acceptance of the Appellate Court harmful to defendants' (sic) due process rights?"

It is apparent that petitioner's claims (a), (b), (e) and (f) lack merit. Neither individually nor collectively do they raise a federal constitutional question. For the most part, these contentions deal with the evidence that led to the jury's verdict of guilty. From the papers before us, it can hardly be said that the instant case is one which would meet the stringent totally-devoid of evidence test enunciated in Thompson v. City of Louisville (1960) 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654. The claim that a conviction was not supported by sufficient evidence is essentially a question of state law and does not rise to federal constitutional dimensions unless there was no proof whatever of the crime charged.

United States ex rel. Terry v. Henderson (2d Cir. 1972) 462 F.2d 1125. Here, any claim that there was no proof whatever of the crime charged would be frivolous. Circumstantial evidence is intrinsically no different from direct evidence, and such evidence can be relied upon to establish guilt. See, Holland v. United States (1954) 348 U.S. 121, 755S.Ct. 127, 99 L.Ed. 150.

In his third contention - (c) - petitioner challenges his conviction on two grounds. First, he maintains that fingernail scrapings - what petitioner refers to as a "body statement" - were taken prior to the giving of the warnings required by Miranda v. Arizona (1966) 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed. 2d 694. Secondly, he challenges the voluntariness of his confession by claiming he received only "a hasty and lackadaisical warning."

Both of these contentions are without merit. First of all, even if the Miranda warnings were not given prior to the scrapings, that would not violate petitioner's Fourth, Fifth, or Sixth Amendment rights. See, Cupp v. Murphy (1973) 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed. 2d 900; Schmerber v. California (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908; and United States v. Wade (1967) 388 U.S 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149. Secondly, petitioner's Miranda challenge was raised at his trial and decided against him after a pre-trial hearing. The state court found beyond a reasonable

doubt that the petitioner was apprised of his Miranda rights prior to interrogation and scrapings, understood the warnings, waived his constitutional rights, and willingly and knowingly submitted to questioning. The court further found that there was no evidence of coercion or threats on the part of the police. Since the state court in its factual determination on the Miranda issue applied the correct standards, it is presumed to be correct. 28 U.S.C. §2254(d); Lavallee v. Delle Rose (1973) 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed. 2d 637.

Petitioner's remaining two contentions also must be rejected. In contention (d), petitioner claims that the state failed to disclose prior to trial the contents of a report made by one of the investigating police officers. In that report, it was noted that a young boy had said that a "John Sinclair" had committed the murder. In addition, the report also stated that a Mrs. McMillan had told police she had seen the victim alive but bleeding from a head wound on the afternoon prior to the discovery of the body. The prosecution had suggested in its presentation that the head wound had occurred at the time of the victim's death.

The state's failure to give the report to the petitioner prior to trial does not appear to violate the due process clause. First of all, this report may have been inculpatory since there was

evidence that petitioner had used the alias of John St. Clair. Secondly, the petitioner was apprised of both statements during the trial and thus had an opportunity to examine Mrs. McMillan and the investigating police officer on those points.

Petitioner's last point - (g) - deals with the fact that on appeal before the Appellate Division, Second Department, several of the exhibits received into evidence at trial were not available for review. The Appellate Division considered this problem at length, see People v. Buford (2d Dept. 1971) 37 A.D. 38, 324 N.Y.S.2d 100, and we agreed with its conclusion that petitioner was not deprived of his right to appeal.

It should be noted that in addition to petitioner's stated seven ground, he raises an issue on page nine of his petition which may (or may not) merit future investigation - the prejudicial affect of pre-trial publicity during his trial. Since this issue was not raised in the state courts, we do not reach a determination of this contention. Petitioner must first exhaust all available state remedies. 28 U.S.C. §2254(b).

Accordingly, petitioner's request for a writ of habeas corpus is in all respects denied.

SO ORDERED.

Dated: New York, New York
November 4, 1974.

WHITMAN KNAPP, U.S.D.J.

Certificate of Service

5/15/75, 19

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thos. Boyle